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No. 76-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

CENTRAL OF GEORGIA RAILROAD COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL., TO AFFIRM

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Supreme Court Rule 16(1)(c) 1

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellee railroads move that the judgment of the District Court be affirmed on the ground that the issue presented is so unsubstantial as not to need further argument.[1]

QUESTION PRESENTED

Whether the District Court correctly construed its own prior, final decision.

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[1] The appellee railroads are the Central of Georgia Railroad Company, Seaboard Coast Line Railroad Company, and Southern Railway Company.

STATEMENT OF THE CASE

The ICC's jurisdictional statement seeks to reargue the merits of the rate dispute resolved against the ICC by a prior District Court decision, which became final after affirmance by this Court. The only facts pertinent to this case concern the correctness of the District Court's interpretation of its own final decision.

1. *The District Court's 1974 Final Decision.* In 1970, the appellee railroads ("railroads") filed tariffs having the effect of increasing certain rail freight rates on kaolin clay moving for export from the Toomsboro district of Georgia through Georgia ports. The increase came about because the railroad tariffs canceled a reduced multiple-car rate for 10-car shipments and thus made applicable to all shipments the prevailing single-car rate.[2]

After shipper interests protested, the ICC began an investigation and suspension proceeding under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7). That section provides that where the ICC investigates a newly changed rate—as opposed to an existing rate—the "burden of proof" is upon the railroad "to show that the proposed changed rate . . . is just and reasonable . . . ."[3]

Following an evidentiary proceeding, the ICC's three-member Review Board decided in November

[2] The new tariffs went into effect in October 1970, after expiration of the statutory suspension period. The rates have since been increased in subsequent rate increase proceedings that are not here in issue.

[3] By contrast, under Section 15(1), 49 U.S.C. § 15(1), the ICC may investigate existing rates but the burden is upon the party contesting the rate, practice or tariff regulation under attack to show that it is not just and reasonable. See, *e.g.*, *Louisville & N. R.R.* v. *United States*, 238 U.S. 1 (1915); *Darling & Co.* v. *Alton & S. R.R.*, 299 I.C.C. 393 (1956).

1970 that the single-car rates had been shown to be just and reasonable as applied to traffic that previously moved under the multiple-car rate. J.S. 60A-91A. The Review Board made findings favorable to the railroads on all of the factors conventionally relevant to rate increases. The Review Board found that the multiple-car rate was not justified by "competitive necessity." J.S. 90A. It agreed that there were no operating economies or cost savings obtained by the railroads on these multiple-car shipments.[4] J.S. 90A. It determined that the new rates would not be "unreasonably high" from a cost of service standpoint. J.S. 89A. Finally, it found that the rates would not significantly impede or divert the export clay traffic. J.S. 89A-91A.

In January 1972, a three-member Division of the ICC—acting through two members—reversed. J.S. 45A-59A. The Division explicitly accepted each of the four basic findings that led the Review Board to sustain the new rates. J.S. 53A-58A. The Division's decision, however, imposed a new and additional requirement that the railroads "also show the existence of circumstances and conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service."[5] J.S. 58A. The railroads expressly objected that the Divi-

[4] In fact, the Review Board found that the railroads' costs here on multiple-car shipments were actually greater, for "in actual operations the handling of multiple-car shipments requires more switching than single-car shipments and cars used for multiple car shipments are held by the shipper longer than cars used for single car shipments." J.S. 90A.

[5] Since the Division itself recognized that the railroads had made the "showing of no actual cost savings" in this instance (J.S. 58A), it was in substance conjecturing that different tariff restrictions and conditions (*e.g.*, limits on car-holding time) might result in different costs and justify different just and reasonable rates.

sion was imposing an additional requirement beyond the scope of a Section 15(7) proceeding, but the full Commission ultimately refused to review the Division decision.

The railroads then sought statutory judicial review before the three-judge District Court. They principally argued that, under the statutory plan established by Section 15(7), the findings made by the Review Board and accepted by the Division satisfied the railroads' statutory burden of proof to show that their new rates fell within the zone of "just and reasonable" rates recognized in this Court's decisions.[6] It was, the railroads argued, no part of their obligation under Section 15(7) to negate the possibility that some other just and reasonable rate might be achieved under other circumstances; and in any event under the zone of reasonableness concept, the existence of a different rate would in no way show that the railroads' own proposed rate fell outside the zone.[7]

In August 1974, the District Court unanimously sustained the railroads' principal ground of appeal and permanently enjoined the ICC's orders. 379 F. Supp. 976 (J.S. 17A-37A).[8] Citing this Court's own deci-

[6] *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499 (1935).

[7] As expressly alternative grounds to their *first* and principal ground based on Section 15(7), the railroads also argue *second* that the Division's new requirement was not supported by rational explanation and *third* that they had been denied a fair opportunity to meet the new requirement even if it was both lawful under Section 15(7) and rationally supported.

[8] The opinion was written by Circuit Judge McGowan and joined in by District Judges Hart and Pratt.

sions on the "zone of reasonableness" concept, the District Court declared that the railroads' burden under Section 15(7) was simply to show that their own new proposed rate fell within this zone, and the Review Board's findings, specifically accepted by the Division, satisfied this requirement. J.S. 17A-18A, 22A, 28A-33A. The District Court found that the Division's additional requirement misconstrued the legislative plan of rate regulation embodied in Section 15(7).

Shipper interests sought review in this Court arguing *inter alia* that the District Court had fundamentally misconstrued the scope of Section 15(7).[9] The railroads moved for summary affirmance on the ground that the statutory issue had been resolved consistently with this Court's "zone of reasonableness" decisions in the *Milwaukee* and *Wichita* cases.[10] This Court summarily affirmed the District Court's decision in May 1975, and that decision is now final. 421 U.S. 957 (J.S. 16A).

2. *The 1976 District Court Decision Under Review.* On July 24, 1975, the ICC entered an order purporting to reopen its original Section 15(7) investigation. J.S. 12A. That order sought explicitly to reimpose on the railroads exactly the same negative burden of proof re-

[9] Jurisdictional statement of United States Clay Producers Traffic Association, *et al.*, Feb. 7, 1975, pp. 3, 19-22, filed in No. 74-989.

[10] Motion of Central of Georgia Railroad Company, *et al.*, to affirm, April 9, 1975, pp. 11-14, filed in No. 74-989. In urging summary affirmance, the railroads did not even seek to argue the other two alternative grounds it had urged in the District Court (see p. 4, n. 7 above), merely reserving them as alternative grounds for affirmance in the event that the Court granted plenary review. *Id.* at 16-17.

quirement which the District Court had declared to be a violation of Section 15(7). J.S. 12A-13A. In describing the requirement reimposed by its new order, the order actually quoted (*id.*) the pertinent language originally contained in the prior Division decision which the District Court had permanently enjoined in its 1974 decision as inconsistent with the statute.[11]

The railroads asked the ICC to withdraw its order, pointing to the plain language of the District Court's 1974 decision holding the very same burden of proof requirement to be unlawful and to the District Court determination (J.S. 32A) that the Review Board's findings accepted by the Division were "conclusive" of the issue in a Section 15(7) proceeding. The ICC denied the railroads' request on the ground that the District Court's 1974 decision had merely held that "it was error not to afford the rail carriers an opportunity" to meet the burden of proof requirement imposed by the Division. J.S. 14A-15A. It then reiterated the same requirement which had previously been enjoined by the District Court. *Id.*

The railroads returned to the District Court seeking an order to compel obedience to the Court's earlier decision. The federal courts have unquestioned authority to enforce obedience to their judgments and in-

[11] The original Division decision required the railroads to show "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service." J.S. 58A. The new June 24, 1975, order of the ICC, reopening the same proceeding, similarly called upon the railroads to file a statement showing "the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple-car service . . . ." J.S. 12A-13A.

junctions by ancillary proceedings and retain continuing jurisdiction to afford such relief.[12] The ICC, in response to the motion, argued that the District Court's 1974 decision had resolved the case on "a very narrow ground, a procedural one," based on the ICC's imposition of an additional element "without affording [the railroads] an opportunity to meet the new standard." Joint opposition to motion to compel obedience, Dec. 18, 1975, p. 8.

On March 17, 1976, the District Court unanimously issued a decision construing its 1974 decision and confirming that the ICC's new endeavor was plainly inconsistent with the previous decision of the District Court. J.S. 1A. The Court stated:

> "Our [1974] decision turned upon the principal argument made by the carriers, namely, that, given the acceptance by the Commission of the facts found by the Review Board on this record, it could not, without violating the statutory scheme, impose a further burden of proof of this kind upon the carriers." J.S. 3A.

It rejected the ICC's interpretation of the opinion as one which "does not, either in its explicit terms or by any fair inference from them, bear any such construction." *Id.* The District Court stated that the ICC could not "without violation of our final judgment," reopen the Section 15(7) proceeding and reimpose the same burden of proof held by the Court to be inappropriate in a Section 15(7) case. J.S. 6A.

[12] *Riggs* v. *Johnson County*, 73 U.S. (6 Wall.) 166 (1867); *Dugas* v. *American Surety Co.*, 300 U.S. 414 (1937); *Mississippi Valley Barge Line Co.* v. *United States*, 273 F. Supp. 1 (E.D. Miss. 1967), *aff'd per curiam*, 389 U.S. 579 (1968).

Both the ICC and the United States filed notices of appeal (J.S. 38A, 40A) but only the ICC has filed a jurisdictional statement. The United States has neither filed a jurisdictional statement nor joined in the ICC's jurisdictional statement. The shipper interests, which appealed from the 1974 decision and opposed the railroads' motion below, did not file a notice of appeal.[13]

ARGUMENT

This case does not require plenary review and the District Court's decision should be summarily affirmed. The District Court correctly construed its own 1974 decision and no further briefing and argument is needed to establish this fact. Granting that the District Court correctly construed its decision, the ICC is no longer free in this case to challenge the merits of the 1974 decision, nor is it entitled to disobey it.

1. In its decision here presented for review, the District Court correctly confirmed that its own 1974 decision rested on "the principal argument made by the carriers," namely, that given the Review Board's findings accepted by the Division, the ICC violated the statutory plan by imposing its new proof requirement. J.S. 3A. The District Court stated that its earlier decision had not rested on either of the alternative contentions made by the carriers: that the ICC's decision was deficient because the new requirement was not rationally supported and that the carriers were entitled, at the very least, to an opportunity to meet the new burden. J.S. 3A-4A.

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[13] The shipper interests—the United States Clay Producers Traffic Association—have filed a brief memorandum which supports the ICC and attempts to reargue (Clay Producers Ass'n mem. 3, 5) the same statutory question on which it previously appealed to this Court. See p. 5, n. 9, above.

The ICC's jurisdictional statement in effect seeks to challenge the District Court's construction of its earlier decision, by describing the 1974 decision repeatedly *as if* it rested on one of the alternative grounds urged by the railroads and not on the "principal argument" made by the railroads and adopted by the lower court in 1974. Repeating the plain misconstruction offered by the ICC orders which reopened this case (J.S. 12A, 14A), the ICC describes the District Court's 1974 decision as though it rested merely on the procedural ground involving a lack of opportunity to meet the burden. J.S. 9, 13. Somewhat inconsistently, the ICC also suggests that the 1974 decision rested merely on a lack of adequate explanation and adequate evidentiary support for its burden of proof requirement. J.S. 8, 14-15.

In fact, the 1974 decision rested clearly upon the statutory ground and not upon either of the alternative grounds initially urged by the railroads if their primary statutory argument failed. The 1974 decision explicitly held that the Division's new proof requirement "failed to reflect accurately the legislative scheme," that the ICC was "violating the statutory scheme" in attempting to turn a Section 15(7) case into a Section 15(1) investigation, and that the ICC's decision "does violence" to the burden of proof concept established by Section 15(7). J.S. 18A, 31A-32A, 33A. The 1974 decision referred specifically to the *Milwaukee* and *Wichita* "zone of reasonableness" decisions, which were a basic premise of the railroads' statutory argument. J.S. 22A.

Although the 1974 decision adverted briefly to facts relied upon by the railroads to support their alternative challenge to the rationality of the new require-

ment, the District Court did not offer these comments as its basic ground of decision. It made them, as it explained in its decision below, because the carriers had been accused in the District Court of bad faith for failing to address issues in the ICC proceeding which the ICC incorrectly claimed had been raised by the evidence. J.S. 4A. The District Court's 1974 decision did not even discuss, let alone rely upon, the railroads' alternative, procedural ground (see J.S. 4A); since the Court struck down the new burden of proof requirement as unlawful, it had no reason to consider whether the ICC had denied the railroads a fair opportunity to meet it.[14]

The District Court's decision in this case correctly construed its earlier 1974 decision and no further consideration of this construction issue is necessary in this Court. Given the correctness of the lower court's construction of its earlier decision, it is indisputable that the ICC's new orders were inconsistent with the earlier decision since they sought to reopen the same Section 15(7) proceeding to reimpose the same new proof requirement that the District Court had previously held to be unlawful. See pp. 5-6, above. No other issues remain open in this case since the District

[14] The ICC also appears to suggest that even if the District Court's 1974 decision rested on the statutory ground, this Court's affirmance might have been based solely on the ICC's procedural error. J.S. 9. However, it is inconceivable that this Court affirmed summarily the District Court's decision on a complex procedural issue that the District Court *did not* decide (see J.S. 4A) and that the railroads *did not* urge or brief as a basis for granting their motion for summary affirmance. See p. 5, n. 10, above. Moreover, this Court affirmed outright (J.S. 16A) the District Court's decision which explicitly rested on the statutory ground and clearly did not contemplate any further proceedings to remedy the asserted procedural defects. J.S. 31A-32A.

Court's 1974 decision became final after its affirmance by this Court in May 1975 and cannot be collaterally attacked or disobeyed by the Commission.

2. Ignoring the finality of the 1974 decision, the ICC's jurisdictional statement repeatedly attempts to suggest that the 1974 decision was erroneous. It attacks the District Court's 1974 holding as a "serious violation" of a principle that burdens in a rate case are not "static concepts," citing the *Wichita Board of Trade* decision, *supra* (J.S. 12); and it argues that the lower court's reference to a possible Section 15(1) proceeding was a "fundamental error" interfering with the ICC's latitude to structure its own proceedings under *American Lines* v. *Louisville & N. R.R.*, 392 U.S. 571 (1968). J.S. 13-14.[15]

Both the *Wichita* and *American Lines* decisions were delivered by this Court well before this Court summarily affirmed the District Court's 1974 decision, so it is obvious that this Court did not regard those cases as inconsistent with the 1974 decision.[16] In any event,

[15] The District Court's 1974 decision, as a corollary to its determination that the Division's new requirement was unlawful in a Section 15(7) proceeding, made clear that it was not foreclosing the ICC from investigating any railroad tariff or practice under Section 15(1) where the party seeking to justify a different rate, practice or tariff regulation would bear the burden of proof. J.S. 31A.

[16] In fact, neither *Wichita Board of Trade* nor *American Lines* is inconsistent in any way with the District Court's 1974 decision. The basic relevance of the *Wichita* case is its reference to the zone of reasonableness concept which directly supports the District Court's decision; the language the ICC quotes (J.S. 13-14) from the *American Lines* decision simply permitted the ICC to apply a well established principle of ratemaking to an existing case despite the possibility that it might ultimately be altered in subsequent rulemaking proceedings. 392 U.S. at 591-92.

the correctness of the 1974 decision is simply not a matter available for further litigation in this case. The ICC could have appealed that decision in 1974. Having failed to do so, it cannot collaterally attack it after it has become final.[17]

It is equally clear that the ICC cannot disobey the 1974 decision by reopening its original Section 15(7) proceeding and reimposing the same Division proof requirement declared in 1974 to violate the statutory plan. The ICC asserts generally that it possesses "flexibility" and "dynamic" powers in conducting its rate proceedings, citing this Court's decision in *United States* v. *Chesapeake & O. R.R.*, No. 75-420, June 17, 1976. J.S. 12. Neither that decision nor any other recognizes any "flexibility" or "dynamic" power enabling an agency to violate the mandate of a reviewing court, nor do the issues in *Chesapeake* have any other conceivable relationship to the present case.

The ICC also argues that the District Court's decision violates the recognized rule that a reviewing court must determine errors of law and not seek to exercise administrative functions. J.S. 11. However, the District Court's 1974 decision rested explicitly upon the ICC's violation of legal standards established in Section 15(7). The only "function" the District Court exercised in 1976 was to require the ICC to respect the 1974 decision, a decision which had found the ICC Review Board's own findings to be "conclusive" of the

[17] The Clay Producers supporting memorandum is even more blatant in seeking impermissibly to reargue the statutory issue which the District Court decided in 1974 and which the Clay Producers previously appealed to this Court. Compare Clay Producers mem. 3 with its own prior jurisdictional statement in No. 74-989, pp. 4, 19.

Section 15(7) proceeding under correct statutory standards. J.S. 32A.

The ICC finally cites several cases in which the ICC was permitted to conduct further proceedings after a reversal of its original decision.[18] However, whether further proceedings are consistent with a reviewing court's decision obviously depends on the particular legal determination made in the reversing judicial decision and on the particular issues raised in proceedings that the agency seeks subsequently to conduct. In *this* case, the ICC's own description of the reopened proceedings (see pp. 5-6, above) shows that it was patently seeking to reimpose the same burden of proof requirement that the District Court had declared unlawful in 1974; and even the ICC cannot argue that its reopening is consistent with the District Court's 1974 decision, granting that that decision (as we have shown) does rest upon the ground that the Division's new proof requirement violated the statutory plan.[19]

[18] In addition to the *Wichita Board of Trade decision* (J.S. 15), it cites *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966), and *Arrow Transp. Co.* v. *Cincinnati, N.O. & T.P. R.R.*, 379 U.S. 642 (1965). J.S. 13.

[19] In citing each of the cases relied on to support further proceedings, the ICC is compelled to assume—quite incorrectly (see pp. 9-12 above)—that the 1974 decision rested on one of the nonstatutory alternative grounds or that the statutory ground is open to attack. Thus, in citing *Arrow* and *Saskatchewan*, the ICC wrongly supposes that its only error in the earlier proceeding was "that the railroads were not sufficiently advised" of the Division's requirement in advance of the Review Board investigation (J.S. 13); and the *Wichita* case is cited on the erroneous assumption that the 1974 decision found merely that the Division "presumption" of cost savings "lacked a full factual basis." J.S. 15.

CONCLUSION

For the reasons stated, the decision of the District Court should be affirmed without further briefing or oral argument.

Respectfully submitted,

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